United States Department of Labor
Employees' Compensation Appeals Board

J.M., III, Appellant	)	
and	)	**Docket No. 21-1213**
	)	**Issued: May 16, 2022**
U.S. POSTAL SERVICE, POINT BREEZE STATION, Philadelphia, PA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 2, 2021 appellant filed a timely appeal from a June 23, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the June 23, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 23, 2021, as he no longer had disability or residuals causally related to his accepted October 19, 2017 employment injury.

FACTUAL HISTORY

On October 19, 2017 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he experienced low back pain when he lifted a tube while in the performance of duty. He worked intermittently thereafter. OWCP accepted appellant's claim for sprain of the ligaments of the lumbar spine. It paid him wage-loss compensation on the supplemental rolls from December 4, 2017 through November 7, 2020 and May 23 through June 22, 2021 and on the periodic rolls from November 11, 2018 through May 22, 2021.

A magnetic resonance imaging (MRI) scan of the lumbar spine dated December 11, 2017 revealed disc degeneration with midline/right paramedian disc protrusion at L4-5.

On April 2, 2018 OWCP expanded the acceptance of appellant's claim to include radiculopathy of the lumbar region.

In a treatment note dated August 22, 2018, Dr. Shawn Puri, a Board-certified anesthesiologist, performed an interlaminar lumbar epidural steroid injection at L4-5 under fluoroscopic guidance. He diagnosed lumbar herniated nucleus pulposus with radiculopathy. Dr. Puri treated appellant in follow up on September 12, 2018 and examination revealed tenderness on palpation of the lower thoracic and lumbar paraspinal muscles and lumbar facet joints at right L3 to S1. He diagnosed post-traumatic lumbago, post-traumatic lumbar facet syndrome, disc herniation at L4-5, and sacroiliitis. Dr. Puri recommended a series of medial branch nerve blocks at lumbar facet joints of L4-5 and L5-S1.

An MRI scan of the lumbar spine dated October 9, 2018 revealed progressive disc degeneration with broad disc protrusion somewhat eccentric to the left at L4-5. Similarly, an MRI scan of the lumbar spine dated October 24, 2018 revealed high-grade disc degeneration localized at the L4-5 level with shallow broad-based disc protrusion and some enhancement suggesting regional granulation tissue.

On October 31, 2018 Dr. Benjamin E. Kaplan, a Board-certified physiatrist, evaluated appellant for a back injury sustained at work on October 19, 2017. Appellant reported returning to work limited-duty part-time capacity and progressing to eight hours a day. He subsequently experienced increased back spasms and back pain and was totally disabled commencing September 28, 2018. Dr. Kaplan diagnosed sprain of the ligaments of the lumbar spine and radiculopathy of the lumbar region. He opined based on a reasonable degree of medical certainty

the diagnosis and diagnostic findings were a direct result of the October 19, 2017 work injury and that appellant had never fully recovered from the original injury.[3]

On December 18, 2018 OWCP expanded the acceptance of appellant's claim to include aggravation of lumbago with sciatica, right side, and aggravation of other intervertebral lumbar disc displacement.

A computerized tomography (CT) of the lumbar spine dated April 21, 2019 revealed no evidence of pars interarticularis defects. An x-ray of the lumbar spine dated April 22, 2019 revealed mild levocurvature of the lumbar spine, nonspecific straightening of the normal lumbar lordosis, degenerative changes of the lumbar spine with intervertebral disc height loss, endplate changes at L4-5, and mild anterior wedging of the L1 vertebral body.

Appellant was reevaluated by Dr. Kaplan on July 12, 2019 for musculoskeletal pain that developed subsequent to the October 19, 2017 work injury. Dr. Kaplan diagnosed sprain of ligaments of the lumbar spine, radiculopathy of the lumbar region, intervertebral disc displacement, lumbar region, and lumbago with sciatica on the right side. He recommended analgesic modalities, therapeutic exercises, and acupuncture and opined that appellant was disabled from work. In a duty status report (Form CA-17) dated October 25, 2020, Dr. Kaplan diagnosed lumbar radiculopathy and noted that appellant was totally disabled from work.

Appellant was treated by Dr. Randall Smith, a Board-certified orthopedist, on August 12, 2019, September 4 and 30, 2020 for chronic back pain after a work injury on October 19, 2017. Dr. Smith diagnosed sprain of ligaments of the lumbar spine, radiculopathy of the lumbar region, intervertebral disc displacement, lumbar region, and lumbago with sciatica. He recommended analgesic modalities, therapeutic exercises, and acupuncture and opined that appellant was totally disabled from work. In a Form CA-17 dated September 30, 2020, Dr. Smith diagnosed herniated nucleus pulposus and noted that appellant was totally disabled from work.

Appellant continued to be treated by Dr. Puri on August 28 and September 19, 2019 for chronic low back pain radiating into the bilateral buttocks. Dr. Puri diagnosed post-traumatic lumbago, post-traumatic lumbar facet syndrome, disc herniations at L4-5, and sacroiliitis. He recommended a midline lumbar epidural injection at L4-5 under fluoroscopic guidance.[4]

Appellant sought medical treatment from Dr. Kaplan, who, in CA-17 forms dated October 25 and December 3, 2020, diagnosed lumbar radiculopathy and noted that appellant was totally disabled from work. On October 29, 2020 Dr. Kaplan evaluated appellant for chronic musculoskeletal pain and diagnosed sprain of ligaments of the lumbar spine, radiculopathy of the

[3] On October 11, 2018 appellant filed a notice of recurrence (Form CA-2a) asserting that he sustained a recurrence of disability on September 28, 2018 causally related to his accepted work injury. On November 1, 2018 OWCP accepted his recurrence claim.

[4] An MRI scan of the lumbar spine dated September 17, 2019 revealed high-grade disc degeneration with shallow broad disc protrusion reducing canal diameter somewhat eccentric to the left at L4-5 with less impingement on the spinal canal compared to the October 9, 2018 examination.

lumbar region, intervertebral disc displacement, lumbar region, and lumbago with sciatica. He noted that appellant remained temporarily totally disabled.

On November 23, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of his employment-related conditions. In a December 8, 2020 report, Dr. Didizian reviewed appellant's history of injury and noted physical examination findings of alternative gait pattern, palpation of the back showed no trigger points over the sacroiliac, sciatic notch or greater trochanter, negative straight leg raising test bilaterally, intact motor strength in the lower extremities, intact sensory examination, and reflexes were present and equal. He diagnosed sprained ligament lumbar spine, aggravation of radiculopathy of the lumbar region, aggravation of lumbago with sciatica, and aggravation of intervertebral disc displacement of the lumbar region, all resolved. Dr. Didizian reported that there was no issue of worsening of the work-related injury rather evidence of progressive degenerative changes. He noted that appellant returned to his baseline condition and all accepted conditions related to the work injury of October 19, 2017 resolved. Dr. Didizian noted appellant's prognosis was good and he could return to the same position held prior to the date of injury without restrictions. He completed a work capacity evaluation (Form OWCP-5c), which indicated that appellant could return to his regular job without restrictions.

OWCP received additional evidence. Dr. Puri treated appellant on October 9, 17, November 1 and December 6, 2019 for chronic low back pain radiating into the bilateral buttocks. He diagnosed post-traumatic lumbago, post-traumatic lumbar facet syndrome, disc herniations at L4-5, and sacroiliitis. Dr. Puri noted that appellant underwent a third interlaminar lumbar epidural injection under fluoroscopic guidance and experienced 50 to 60 percent relief for two weeks.[5] He recommended continued physical therapy two to three times a week.

On a Form CA-17 dated January 6, 2021 Dr. Kaplan diagnosed lumbar radiculopathy and opined that appellant was totally disabled from work.[6]

On January 20, 2021 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because his October 19, 2017 work-related injury had resolved. It found that the weight of medical evidence rested with the December 8, 2020 medical report of Dr. Didizian, OWCP's second opinion physician, who found that appellant no longer had any residuals or disability causally related to his accepted October 19, 2017 employment injury. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

OWCP received additional evidence. On December 3, 2020 and January 6, 2021 Dr. Kaplan treated appellant for muscular skeletal pain that developed following his work injury. He diagnosed sprain of ligaments of the lumbar spine, radiculopathy of the lumbar region,

[5] On September 25, October 17, and November 20, 2019 Dr. Puri performed interlaminar lumbar epidural steroid injections at L4-5 under fluoroscopic guidance and diagnosed lumbar herniated nucleus pulposus with radiculopathy.

[6] Appellant attended several chiropractic treatments in 2019 with Dr. Robert Cimino, Jr., a chiropractor.

intervertebral disc displacement, lumbar region, and lumbago with sciatica on the right side. Dr. Kaplan recommended physical therapy and opined that appellant was totally disabled from work. On a Form CA-17 dated February 24, 2021 he diagnosed radiculopathy and advised that appellant was totally disabled from work.

In reports dated January 27 and March 31, 2021, Dr. Smith treated appellant in follow up for chronic low back pain due to injuries sustained in the workplace. He reviewed Dr. Didizian's report and disagreed with his conclusions and recommendations. Dr. Smith noted ongoing objective symptoms consistent with his MRI scan studies. He noted that the disc degeneration was far greater than would be expected in an individual of appellant's age and prior history and opined that his condition was the result of the October 19, 2017 work injury. Dr. Smith determined that appellant remained totally disabled from work. In CA-17 forms dated January 27 and March 31, 2021, he diagnosed lumbar protrusions, stenosis, and radiculopathy and opined that appellant was totally disabled from work.

OWCP found that a conflict in medical evidence existed between Dr. Smith, appellant's treating physician, and Dr. Didizian, OWCP's second opinion examiner, with regard to the status of appellant's accepted condition and his ability to return to work. As such, on March 31, 2021, it referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical evidence. OWCP prepared a SOAF dated March 25, 2021, noting that appellant's claim was accepted for sprain of the ligaments of the lumbar spine, radiculopathy of the lumbar region, aggravation of lumbago with sciatica, right side, and aggravation of other intervertebral disc displacement of the lumbar region.

In a May 6, 2021 report, Dr. Askin noted his review of the SOAF, as well as the medical evidence of record. He acknowledged that the SOAF was binding for purposes of the examination and that all of his responses would adhere to that stricture. Upon examination of appellant's lumbar spine, Dr. Askin observed pain in the lumbar region and no tenderness from the neck to the low back or spasm. Range of motion was normal and straight leg raise testing was negative. Examination of appellant's lower extremities revealed 5/5 strength with hip flexion and extension, adduction and abduction. Dr. Askin noted that the accepted conditions were not corroborated by the MRI scans, there was no documentation of a partial tear of any ligament to support a sprain of the ligament, and there were no clinical features of nerve root irritation, which speaks against the presence of sciatica. With regard to intervertebral disc displacement, he noted that this was a common finding among persons who were no longer young and was the result of losing the vascularity of the intervertebral discs upon attainment of skeletal maturity. Dr. Askin noted: "To the extent that your office accepted, [appellant] as having an 'aggravation' and would be akin to moving a rusty hinge and making it squeak…." He indicated that appellant's degenerative disc process was baseline, but "may" have been temporarily aggravated by the original incident, but has since long resolved. Dr. Askin further noted: "Some individuals are stoic, suck it up, and continue to function in normal fashion, and others find healthcare providers who enable allegations of incapacity, even when such is not medically reasonable, necessary, or appropriate." He noted that appellant's "presentation to his chosen healthcare provider's office serve no utilitarian purpose, given that there is no expectation that any service provided at that office would shorten the duration of symptoms, improve capability for activity, or address an underlying condition … and is so far afield from what is medically appropriate … to be considered antitherapeutic."

Dr. Askin found no objective clinical findings and no physical limitations consequential to his accepted work-related conditions. He noted that no further treatment or ongoing restrictions were indicated in relation to the October 19, 2017 work injury.

OWCP received additional evidence. A February 24, 2021 report from Dr. Kaplan noted appellant's complaints of pain and dysfunction across the lumbar spine resulting in nerve compression and radiculopathy. Dr. Kaplan noted diagnoses and opined that appellant remained temporarily totally disabled from work. On March 31, 2021 Dr. Smith noted no change in appellant's physical examination and opined that appellant remained totally disabled from work.

On May 14, 2021 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits because his October 19, 2017 work-related injury had resolved. It found that the special weight of medical evidence rested with the May 6, 2021 medical report of Dr. Askin, OWCP's impartial medical examiner (IME), who found that appellant no longer had any residuals or disability causally related to his accepted October 19, 2017 employment injury. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.[7]

OWCP received additional evidence. In a May 21, 2021 report, Dr. Smith noted tendemess at the right L4-5 facet, limited range of motion of the lumbar spine, and tightness in the paraspinal muscles at L3-5. He returned appellant to work on May 26, 2021 on a trial basis for four hours a day with the use of a cart and limited bending, lifting, and climbing. In correspondence dated June 2, 2021, Dr. Smith disagreed with the findings of Dr. Askin and indicated that he gave no weight to appellant's history and attributed appellant's symptoms to aging, but ignored that appellant experienced an acute onset injury that had not resolved. He explained that appellant's history was consistent with a traumatic injury that has improved with his present treatment, but has not resolved. Dr. Smith noted that appellant still had persistent complaints of low back pain and opined that appellant continued to have residuals of his work-related injury of October 19, 2017.

On June 9, 2021 OWCP requested that Dr. Askin provide a supplemental report and address the findings and conclusions of Dr. Smith in his May 21 and June 2, 2021 reports.

In a June 21, 2021 report, Dr. Askin reviewed Dr. Smith's reports and noted that there was no new information suggesting a need for him to depart from his previously expressed opinions concerning appellant's condition. He opined to a reasonable degree of medical certainty that appellant fully recovered from the accepted injury.

By decision dated June 23, 2021, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date. It found that the special weight of the medical evidence rested with Dr. Askin, the IME, who had determined on May 6 and June 21, 2021 reports that appellant did not have residuals or disability due to a work-related lumbar injury.

[7] In a memorandum of telephone call (Form CA-110) dated May 26, 2021, appellant reported returning to work part time, for four hours a day.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[8] It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[9] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[10]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[11] To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition, which require further medical treatment.[12]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.[13] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 23, 2021.

OWCP accepted that appellant sustained a sprain of the ligaments of the lumbar spine, radiculopathy of the lumbar region, aggravation of lumbago with sciatica, right side, and aggravation of other intervertebral disc displacement of the lumbar region. It found that a conflict

[8] *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[9] *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[10] *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[11] *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[12] *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

[13] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[14] 20 C.F.R. § 10.321.

[15] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

in medical opinion evidence existed between Dr. Smith, appellant's treating physician, and Dr. Didizian, OWCP's second opinion examiner, regarding whether his accepted conditions resolved and if he had continuing disability as a result of the accepted employment injury. OWCP properly referred appellant, together with a SOAF, to Dr. Askin for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a). The SOAF provided to Dr. Askin specifically noted that appellant's claim was accepted for sprain of the ligaments of the lumbar spine, radiculopathy of the lumbar region, aggravation of lumbago with sciatica, right side, and aggravation of other intervertebral disc displacement of the lumbar region.

In a report dated May 6, 2021, Dr. Askin, in addressing whether the accepted conditions of sprain of the ligaments of the lumbar spine, radiculopathy of the lumbar region, aggravation of lumbago with sciatica, right side, and aggravation of other intervertebral disc displacement of the lumbar region had resolved, stated that "the accepted conditions were not corroborated by the magnetic resonance scans. A sprain of a ligament is a partial tear, and there is no documentation of a partial tear of any ligament. [Appellant] has no clinical features of nerve root irritation, which speaks against the presence of sciatica at the present time." Dr. Askin opined that the accepted "intervertebral disc displacement" was a common incidental finding among persons who are no longer young. He advised that despite treatment appellant experienced no relief in symptoms noting "[s]ome individuals are stoic, suck it up, and continue to function in normal fashion, and others find healthcare providers who enable allegations of incapacity, even when such is not medically reasonable, necessary, or appropriate." Dr. Askin noted that appellant's "presentation to his chosen healthcare provider's office serve no utilitarian purpose, given that there is no expectation that any service provided at that office would shorten the duration of symptoms, improve capability for activity, or address an underlying condition … and is so far afield from what is medically appropriate … to be considered antitherapeutic." Although he had stated that he would follow the framework of the SOAF, he nonetheless reached conclusions that were contrary to the findings in the SOAF.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF. OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or IME renders a medical opinion based on a SOAF, which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[16] As Dr. Askin did not use the SOAF as the framework in forming his opinion, his opinion is of diminished probative value.[17] He failed to rely upon a complete and accurate SOAF and, thus, his opinion is of diminished probative value and is not entitled to the special weight accorded to an IME.[18]

[16] *Id.*; *see also N.W.*, Docket No. 16-1890 (issued June 5, 2017).

[17] *Id.*; *see also Y.D.*, Docket No. 17-0461 (issued July 11, 2017).

[18] *See S.T.*, Docket No. 18-1144 (issued August 9, 2019) (medical opinions based on an incomplete or inaccurate history are of limited probative value).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 23, 2021.

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 16, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board